IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 1ST NOVEMBER 2007 / 10TH KARTHIKA 1929

I.T.Appeal No.122 of 2007

ORDER DATED 18.5.2007 IN I.T.A.NO.406(COCH)/2005 OF THE INCOME TAX APPELLANTE TRIBUNAL, COCHIN BENCH, COCHIN

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APPELLANT/RESPONDENT IN I.T.A:-

K.P. VARKEY,
PROPRIETOR,
TOLIN RUBBERS,
MATTOOR,
KALADY.

BY ADVS. SRI.A.M.SHAFFIQUE
SRI.A.K.JAYASANKAR NAMBIAR

RESPONDENT/APPELLANT IN I.T.A.:-

DY. COMMISSIONER OF INCOME TAX,
K.A.P.COMMERCIAL COMPLEX,
R.S.ROAD,
ALUVA.

BY ADV. SRI. GEORGE K.GEORGE ,
STANDING COUNSEL FOR GOVERNMENT OF INDIA (TAXES).

THIS INCOME TAX APPEAL HAVING COME UP FOR ADMISSION ON 01/11/2007, ALONG WITH I.T.A.NO.124 OF 2007 & CONNECTED CASES THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

H.L.Dattu,C.J. & K.T. Sankaran,J.

I.T.Appeal Nos.122 of 2007, 124 of 2007, 123 of 2007
131 of 2007, 132 of 2007, 125 of 2007, 96 of 2007,
116 of 2007, 113 of 2007, 114 of 2007, 112 of 2007,
115 of 2007, 121 of 2007, 126 of 2007, 127 of 2007,
128 of 2007, 129 of 2007 and 130 of 2007.

Dated, this the 1st day of November, 2007

JUDGMENT

H.L.Dattu,C.J.

Since the issues involved in all these appeals are common, they are clubbed, heard and disposed of by this common order.

(2) I.T.A.Nos.122 of 2007, 124 of 2007, 123 of 2007, 131 of 2007, 132 of 2007 and 125 of 2007 are filed by K.P.Varkey, Proprietor, M/s.Tolin Rubbers. These appeals pertains to the assessment years 1996-97 to 2001-02. They are filed against the orders passed by the Income Tax Appellate Tribunal, Cochin Bench, Cochin in I.T.A.Nos.406 (Coch)/2005 to 411(Coch)/2005.

(3) K.V.Tolin, Proprietor, M/s.Tolin Pre-Treads has filed I.T.A.Nos.96 of 2007, 116 of 2007, 113 of 2007, 114 of 2007, 112 of 2007 and 115 of 2007 and they also relate to the assessment years 1996-97 to 2001-02. They arise out of an order passed by the Income Tax Appellate Tribunal in I.T.A.Nos.412(Coch)/2005 to 417(Coch)/2005.

(4) Smt.Annie Varkey, Proprietor, M/s.Toshima Rubber Products has filed I.T.A.Nos.121 of 2007 to 130 of 2007 and they arise out of an order passed by the Income Tax Appellate Tribunal in I.T.A.Nos.418 (Coch)/2005 to 423 (Coch)/2007. They relate to the assessment years 1996-97 to 2001-02.

(5) Tolin Rubbers Private Limited is a Company incorporated under the provisions of the Companies Act.

(6) The Central Excise authorities had conducted an inspection in the business premises of Tolin Rubbers Private Limited. After such inspection, they had found certain amounts deposited in the benami accounts. They have initiated further proceedings pursuant to such an inspection. We are not concerned with the proceedings initiated by the Central Excise authorities in these appeals.

(7) The assessing authority had completed the assessment proceedings against Tolin Rubbers Private Limited and had quantified the tax liability under the provisions of the Income Tax Act (hereinafter for the sake of brevity referred to as "the Act"). After receipt of the information from the Central Excise authorities, the assessments in the case of Tolin Rubbers Private Limited and also in the case of K.P.Varkey, Proprietor, M/s.Tolin Rubbers; K.V.Tolin, Proprietor, M/s.Tolin Pre-Treads and Smt.Annie Varkey, Proprietor, M/s.Toshima Rubber Products were taken up for reassessment proceedings under Section 148 of the Act.

(8) The parties had questioned the initiation of proceedings before the various forums. Thereafter the assessing authority has completed the substantive assessments in the case of Tolin Rubbers Private Limited and precautionary assessments/protective assessments in the case of K.P.Varkey, Proprietor, M/s.Tolin Rubbers; K.V.Tolin, Proprietor, M/s.Tolin Pre-Treads and Smt.Annie Varkey, Proprietor, M/s.Toshima Rubber Products.

(9) Tolin Rubbers Private Limited had called in question the said reassessment proceedings before this Court in O.P.No.12888 of 2003. This Court

had rejected the said writ petition by its order dated 21.05.2003. Thereafter Tolin Rubbers Private Limited had filed W.A.No.953 of 2003 before this Court. This Court by order dated 4.8.2003 was pleased to allow the Writ Appeal and was pleased to pass the following order:-

> "8. In view of the order we are proposing to pass, we do not consider it appropriate to make any observation on the merits of the controversy. We shall only say that even if it were to be assumed that the appellant is a bad company, it appears that it has a just cause. Admittedly, the documents and the evidence which had been used against the assessee, had not been put to it. The copies had not been supplied. In this situation, we consider it appropriate to quash the impugned orders of assessment and the notices of demand.
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> 9. It is true that normally a party should exhaust the alternative remedy before it approaches this court. However, in the present case, it does not appear to be fair to do so. Basically, the assessee was to be given a due and reasonable opportunity by the Assessing Officer. This was not done. The opportunity, even if given by the appellate authority shall not be a fair substitute. In any event, the requirement of deposit of the amount of tax (unless waived) would cause further burden. The whole process is likely to cause delay and defeat justice. Thus, we quash the impugned orders and notices.
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> 10. In view of the above, we remit the matter to the assessing authority for a fresh decision in accordance with law. It is clarified that the quashing of the orders shall not entitle the appellant to the immediate refund of Rs.25 lakhs that it had deposited. However, the appellant's entitlement shall be determined in the light of the final order. In case it is found that no tax was due from the appellant, it shall be entitled to the refund with interest. Otherwise, the amount deposited shall be adjusted against the demand. At this stage, we do not consider it appropriate to make any observation on the merits of the controversy".

(10) By the aforesaid order, this Court has set aside the substantive assessments passed against Tolin Rubbers Private Limited and the matter is remanded to the assessing authority to redo the matter in accordance

with law and in the light of the observations made by this Court while disposing of the Writ Appeal.

(11) K.P.Varkey, Proprietor, M/s.Tolin Rubbers; K.V.Tolin, Proprietor, M/s.Tolin Pre-Treads and Smt.Annie Varkey, Proprietor, M/s.Toshima Rubber Products, aggrieved by the orders passed by the assessing authority under Section 148 of the Act, had called in question the same before the first appellate authority. The first appellate authority, after considering the issues raised by the appellants and after hearing the departmental representative, has allowed the appeals filed by the aforesaid persons.

(12) The Department, being aggrieved by the orders so passed by the first appellate authority/Commissioner of Income Tax (Appeals)-V, Kochi for the assessment years 1996-97 to 2001-02, had filed 18 appeals before the Income Tax Appellate Tribunal.

(13) The Tribunal by its order dated 18.05.2007 has allowed the Department's appeals and has remanded the matter to the assessing authority to pass fresh orders in accordance with law. The basis or foundation for passing the impugned order without going into the merits of the appeal is, the orders passed by this Court in W.A.No.953 of 2003. According to them, since the substantive assessments in the case of Tolin Rubbers Private Limited has been set aside by this Court, it would be in the interest of all the parties that the appeals filed by the Department against the orders passed by the Commissioner of Income Tax (Appeals) also require to be set aside and an opportunity should be given to the assessing authority to redo the matter in accordance with law.

(14) Aggrieved by the conclusions so reached by the Tribunal, K.P.Varkey, Proprietor, M/s.Tolin Rubbers; K.V.Tolin, Proprietor, M/s.Tolin Pre-

Treads and Smt.Annie Varkey, Proprietor, M/s.Toshima Rubber Products are before us in these batch of appeals.

(15) The appellants have raised the following substantial questions of law for our consideration and decision. They are as under:

> "(i) Whether the tribunal was right in law and on facts in setting aside the order of the CIT (Appeals) which clearly held that in view of the Central Excise authorities confirming that no case had been registered against the appellant, there was no basis for the continuation of protective assessments against the appellant;
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> (ii) Whether the Tribunal was right in law and on facts in directing the assessing officer to decide the matter afresh especially when the substantive assessment of Tolin Rubbers (P) Limited was set aside by the High Court and further, the very basis for the protective assessment initiated against the appellant had been taken away by the letter dated 27.10.2004 (Annexure H) of the Central Excise authorities;
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> (iii) Whether the Tribunal was right in law and on facts in directing the assessing officer to decide the protective assessments afresh especially when the issue of initiation of a protective assessment is a matter which has to be decided by the assessing officer at the time of conducting a regular assessment against the main assessee (in this case Tolin Rubbers (P) Limited) and not prior to it.
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> (iv) Whether the Tribunal was right in law and on facts in directing the assessing officer to decide the protective assessments afresh especially when the decision of the Hon'ble Supreme Court in the case of Lalji Haridas Vs. ITO - 1961 (43) ITR 387 (SC) - clearly indicates that the finalization of protective assessments must await the outcome of the substantive assessment".

(16) Sri.Jayasankar.A.K., learned counsel appearing for the appellants would contend that the Tribunal was not justified in allowing the Department's appeals, primarily on the ground that the substantive assessments in the case of Tolin Rubbers Private Limited have been set aside by this Court. He is of the view, that, since the assessees have succeeded before the first

appellate authority/Commissioner of Income Tax (Appeals) and the Department is before the Tribunal in the appeals filed, the Tribunal ought to have decided the appeals filed by the Department on its merit, instead of remanding the matter to the assessing authority to redo the matter in accordance with law. In support of this submission, the learned counsel relies upon the observations made by the apex Court in the case of *Lalji Haridas* v. *Income Tax Officer and another* [(1961) 38 ITR 387] and the observations made by the Allahabad High Court in the case of *Smt.Hemlata Agarwal* v. *Commissioner of Income-tax, U.P.* [1967) 64 ITR 428].

(17) Per contra, Sri.George K.George, learned counsel appearing for the Department tries to justify the impugned order passed by the Tribunal in setting aside the orders passed by the first appellate authority/Commissioner of Income Tax (Appeals). The learned counsel in support of his submission would rely upon the observations made by the Calcutta High Court in *Jagannath Hanumanbux* v. *Income-tax Officer* [(1957) 31 ITR 603] and the observations made by the apex Court in the case of *Income-tax Officer, "A" Ward, Lucknow* v. *Bachu Lal Kapoor* [(1966) 60 ITR 74].

(18) The facts are not in dispute. The assessing authority/Income Tax Officer has passed the substantive assessments in the case of Tolin Rubbers Private Limited for the assessment years 1996-97 to 2001-02 and protective assessments in the case of K.P.Varkey, Proprietor, M/s.Tolin Rubbers; K.V.Tolin, Proprietor, M/s.Tolin Pre-Treads and Smt.Annie Varkey, Proprietor, M/s.Toshima Rubber Products. Tolin Rubbers Private Limited, who had suffered an order of substantive assessment, had called in question the orders of reassessment so passed by the Income Tax Officer in exercise of his powers

under Section 148 of the Act, before this Court. This Court, accepting the contention of the assessee that the orders so passed by assessing authority are in violation of the principles of natural justice, has thought it fit to remand the matter to the assessing authority to redo the matter in accordance with law. That only means that the substantive assessments made in the case of Tolin Rubbers Private Limited are now set aside by a Bench of this Court reserving liberty to the assessing authority to redo the matter.

(19) However, in the case of K.P.Varkey, Proprietor, M/s.Tolin Rubbers; K.V.Tolin, Proprietor, M/s.Tolin Pre-Treads and Smt.Annie Varkey, Proprietor, M/s.Toshima Rubber Products, the assessing authority had passed protective assessments/precautionary assessments and those assessments were set aside by the first appellate authority. That is how the Department is in appeals before the Income Tax Appellate Tribunal.

(20) The Appellate Tribunal, without going into the merits of the appeals filed by the Department, merely on the ground that the substantive assessments in the case of Tolin Rubbers Private Limited has been set aside by a Bench of this Court, has allowed the appeals filed by the Department and remanded the matter to the assessing authority to redo the matter in accordance with law. The observations made by the Tribunal in this regard is at paragraph 7 of the orders passed by the Tribunal. The same is as under:

> "It is not disputed that substantive assessments are made in the case of Tolin Rubbers Pvt. Ltd and those assessments were subject matter of Writ Petition being WA No.No.953 of 2003 (A). It is also not disputed that the Hon'ble High Court was pleased to remit all the substantive assessments to the file of the assessing authority for re-doing or fresh decision as the Hon'ble High Court was of the opinion that the documents and evidence which had been used by the said authority have not been put to it and,

> therefore, the Hon'ble High Court quashed the impugned orders in the case of Tolin Rubbers Pvt. Ltd and remitted the matter back to the assessing authority. Hence, in the case of Tolin Rubbers Pvt. Ltd., the matters have been restored to the file of the AO as there was gross violation of the principles of natural justice. Moreover, though the Hon'ble High court was pleased to quash the assessments, all the assessments were restored to the file of the AO for fresh decision. In the cases of these three assessees, though protective assessments are made it is not correct to say that merely because the substantive assessments have been quashed and restored to the file of the assessing authority, these assessments do not survive. As the substantive assessments have been restored to the file of the AO, we consider it fit to restore the issue before us taken by the revenue to the file of the AO to decide them afresh after framing substantive assessments in the case of Tolin Rubbers Pvt. Ltd. as per the directions of the Hon'ble High court of Kerala in WA No.953 of 2003 (A) vide judgment dated 4.8.2003. We, therefore, set aside the orders of the CIT (Appeals) on this issue which are arising out of the grounds taken by the revenue and restore the matters to the file of the AO to decide them afresh. We make it clear that the CIT (Appeals) has given a categorical finding on merits that the Central Excise Department has given letter dated 27-10-2004 in the case of these three assessees wherein it is mentioned that no case has been registered against these assessees and AO should take into consideration the said aspect of the case also".

(21) The concept of the protective assessments/precautionary assessments is well explained by the Calcutta High Court in the case of ***Jagannath Haumanbux* v. *Income-tax Officer*** [(1957) 31 ITR 603]. A learned Judge, after referring to the observations made by Rowlatt, J. in the case of ***Attorney-General* v. *Aramayo & Others*** [(1925) 1 K.B. 86 = 9 Tax Cas.445], has observed as under:-

> "Thus, I must hold that under the Indian law it is permissible to take a protective assessment. I do not think that the principles of law put forward by Mr.Roy are in any way wrong. There can be no doubt that taxing statutes must be strictly construed in favour of the assessee. It is also true that there cannot be any assessment excepting of an assessee, and there can be no doubt that the Income-tax authorities must confine themselves within the four

corners of the statute and not invent new procedures outside the limits of the Indian Income-tax Act. But let us see what they have really done. It is not as if they have made the assessment outside the Indian Income-tax Act. The trouble is that owing to the various litigations mentioned above, it is not established finally as to who is the proper assessee. It is not permissible to assess a fictitious person, but I do not see that there is anything to prevent assessment of a person of whom it is not finally known whether he is fictitious or not. What is the most important thing to consider is the running of time. If the Income-tax authorities are precluded from making an alternative assessment, then, by the time the disputes are over, the real assessment would be barred. Therefore, I cannot see why an alternative assessment, that it to say, protective assessment, should be declared to be illegal. But while a protective assessment is permissible, I do not see that a protective recovery is to be allowed. It is one thing to say that the authorities are merely making an assessment and leaving it as a paper assessment until the matter is decided one way or the other, and another thing to say that at one and the same time they could not only make two assessments in respect of one set of dues but proceed to realise both. Mr.Meyer argues that if in the case of protective assessment the principle is followed, namely, that the revenue has to be protected against the bar of limitation, equally, protective recovery should be allowed because recovery also may be barred. I cannot agree. If the Income-tax authorities decided that the present assessment was the valid assessment and kept another alternative assessment in cold storage, then I could understand the force of the argument that the present assessment should proceed to the stage of recovery. But having once stated that the present assessment was not correct, because according to the authorities the firm was a mere *benamidar* of another firm, it would be entirely against the spirit and tenor of the Income-tax Act to proceed to recover the tax on the basis of the professedly wrong assessment. From this point of view, the notices given to the various parties to pay money appear to be defective. The question, therefore, is as to whether on the facts and circumstances of the case as I have stated above, the petitioner is entitled to any relief in this application. The position is that the monies in the hands of these various parties are *prima facie* due to Messrs.Jagannath Hanumanbux. If that firm consists of the partners Ganpatrai and Hanumanbux, then the Income-tax authorities will be entitled to receive these sums direct. But supposing that they are not the partners and that Ladhuram Taparia is the real assessee and that Jagannath Hanumanbux is the *benamidar* of Ladhuram Taparia, then also the monies in the hands of these parties will be payable to the Income-tax authorities, because taxes are payable by Ladhuram Taparia and notices under section 46 (5A) have also been served, in respect of taxes due from that firm. If that is the position, then should this

> Court come to the aid of the petitioner, which will only mean that it will be enabled to take away the monies and defeat the claim of the income-tax authorities. Mr.Meyer on behalf of the Income-tax authorities agreed to give an undertaking that they will take this money and keep it in a suspense account until the Supreme Court has decided the rights of the parties one way or the other, and further that the Income-tax authorities will not execute or enforce the taxes twice over, that is to say, once against Jagannath Hanumanbux and a second time against Ladhuram Taparia. The petitioners, however, are not agreeable to this course. It is quite evident that they are anxious to take away the money. After all, relief under article 226 is discretionary and it ought not to be exercised so as to defeat a lawful claim, particularly that of the State's revenue. So far as these debtors are concerned, I do not think that they can with any safety to themselves pay the monies to Messrs.Jagannath Hanumanbux. Under the circumstances, I do not see why I am compelled to make an order which will confuse all these debtors and be instrumental in aiding the immediate petitioner before me to realise monies and take it beyond the reach of the Income-tax authorities. While I cannot hold that a protective recovery is permissible in law, I do hold that on the facts and circumstances of the case, this Court ought not to come to the aid of the petitioner under article 226 of the Constitution. If they have any other relief and remedies, it is open to them".

(22) Reference to aforesaid judgment is made by the Supreme Court in ***Lalji Haridas case*** (supra) also. The Court while holding that the protective assessments can be made by the Income Tax authorities, though the same is not provided under the provisions of the Income Tax Act, has stated as under:

> "In cases where it appears to the income-tax authorities that certain income has been received during the relevant year but it is not clear who has received that income and, prima facie, it appears that the income may have been received either by A or by B or by both together, it would be open to the income-tax authorities to determine the question who is responsible to pay tax by taking assessment proceedings both against A and B".

(23) Having said so, the apex Court in ***Lalji Haridas case*** (supra)

directed the assessing authority first to complete the substantive assessments and it is only thereafter to proceed against Chhotalal against whom the protective assessments were passed by the assessing authority. The observations made by the apex Court is as under:

> "In other words, the respondent's case clearly is that the notices issued against the two brothers by their respective Income-tax Officers are intended to determine who is responsible to pay tax for the income in question; now though Mr.Nambiar wanted to argue that protective or precautionary assessment of tax is not justified by any of the provisions of the Act he did not seriously contest the position that at the initial stage it would be open to the income-tax authorities to determine by proper proceedings who is in fact responsible for the payment of tax, and that is all that is being done at the present stage. In case where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie it appears that the income may have been received either by A or B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B. That being so, we do not think that Mr.Nambiar would be justified in resisting the enquiry which is proposed to be held by respondent No.I in pursuance of the impugned notice issued by him against the appellant. Under these circumstances we do not propose to deal with the point of law sought to be raised by Mr.Nambiar."
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> We would, however, like to add one direction in fairness to the appellants. The proceedings taken against both the appellants should continue and should be dealt with expeditiously having regard to the fact that the matter is fairly old. In the proceedings taken against Lalji the Income-tax Officer should make an exhaustive enquiry and determine the question as to whether Lalji is liable to pay the tax on the income in question. All objections which Lalji may have to raise against his alleged liability would undoubtedly have to be considered in the said proceedings. Proceedings against Chhotalal may also be taken by the Income-tax Officer and continued and concluded, but until the proceedings against Lalji are finally determined no assessment order should be passed in the proceedings taken against Chhotalal. If in the proceedings taken against Lalji it is finally decided that it is Lalji who is responsible to pay tax for the income in question it may not become necessary to make any order against Chhotalal. If, however, in the said proceedings Lalji

> is not held to be liable to pay tax or it is found that Lalji is liable to pay tax along with Chhotalal it may become necessary to pass appropriate orders against Chhotalal. When we suggested to the learned counsel that we propose to make an order on these lines they all agreed that this would be a fair and reasonable order to make in the present proceedings."

(24) The view expressed by the apex Court in the case of Lalji Haridas is reiterated by the apex Court in the case of ***Income-tax Officer, "A" Ward, Lucknow*** **v.** ***Bachu Lal Kapoor*** [(1966) 60 ITR 74). The same is as under:

> "Some argument was advanced on the question of the validity of what are called "protective or precautional assessments". Reference was made to Jagannath Hanumanbux v. Income-tax Officer and to the decision of this court in Lalji Haridas v. Income-tax Officer. In the former, the validity of protective assessment was approved; and in the latter, this court, though the question of assessment was raised, did not express its final opinion thereon. This court held that when there was a doubt as to which person among two was liable to be assessed, parallel proceedings might be started against both; and it also laid down an equitable procedure to be followed in that situation. In this case, the question of protective assessment does not call for our decision and we do not express our opinion thereon.
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> We, therefore, hold that the High Court went wrong in holding that the Income-tax Officer had no jurisdiction to initiate proceedings under section 34 of the Act against the respondent as the karta of a Hindu undivided family".

(25) The law on the point is now well settled in so far as protective assessments and substantive assessments that can be passed by the Income Tax Officers. Reiteration of the principles enunciated by the apex Court in this judgment may not be necessary.

(26) The question now to be answered by us is, merely because a substantive assessment passed by the Income Tax Officer/assessing authority is

set aside by the superior forum, whether the appeals filed against the protective assessments require to be allowed without going into the merits or demerits of the appeals.

(27) We once again reiterate that the Tribunal, in the appeals filed by the Department, has not decided the matter on merits. It has only allowed the appeals merely on the ground that the substantive assessments made in the case of Tolin Rubbers Private Limited have been set aside by a Division Bench of this Court.

(28) In our opinion, in a situation of this nature, an equitable consideration requires to have been adopted by the Tribunal. It could have kept the appeals filed by the Department pending till a substantive assessment is passed by the Income Tax Officer as directed by this Court while disposing of the Writ Appeal or in the alternative, it could have decided the appeals filed by the Department on merits, since the assessees have succeeded before the first appellate authority. Merely because a substantive assessment has been set aside by a Bench of this Court, it is not permissible for the Tribunal to have allowed the Department's appeals by setting aside the orders passed by the first appellate authority.

(29) In view of the above, we are of the opinion, we cannot sustain the conclusion reached by the Tribunal while allowing the Department's appeals. Therefore, we pass the following:

Order

(i) The appeals are allowed.

(ii) The matter is now remanded back to the Tribunal either to wait till the Income Tax Officer completes the substantive assessments in the case of Tolin

Rubbers Private Limited as directed by a Division Bench of this Court or in the alternative, to dispose of the appeals filed by the Department against the orders passed by the first appellate authority for the assessment years 1996-97 to 2001-02 on merits.

(iii) In our opinion, the Tribunal, if it chooses the first alternative which we have suggested, it would be in the interest of both the Department as well as the assessees, viz., K.P.Varkey, Proprietor, M/s.Tolin Rubbers; K.V.Tolin, Proprietor, M/s.Tolin Pre-Treads and Smt.Annie Varkey, Proprietor, M/s.Toshima Rubber Products.

(30) With the above observations and directions, these appeals are disposed of.

Ordered accordingly.

H.L. Dattu
Chief Justice

K.T. Sankaran
Judge

vku/DK.